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No. 97-1999

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

FIREMAN'S FUND INSURANCE COMPANY,

Petitioner,

vs.

M.V. DSR ATLANTIC, her engines, tackle, machinery, etc., in rem.; CHO YANG SHIPPING COMPANY, LTD. a corporation,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE AMERICAN INSTITUTE OF MARINE UNDERWRITERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF OF THE AMERICAN INSTITUTE OF MARINE UNDERWRITERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

The American Institute of Marine Underwriters ("AIMU") hereby respectfully requests permission to file a brief *amicus curiae* in this matter.[1] Written consent of all parties has been

1. The invaluable assistance of Elura Nanos and Bill N. Zois, students at New York Law School, in drafting this motion and brief *amicus curiae* is gratefully acknowledged.

duly requested. Petitioner has consented to the filing of this brief. Respondent Cho Yang Shipping Company, Ltd. also has consented to the filing of the attached brief. Respondent M.V. DSR ATLANTIC has refused to consent. Letters consenting to the filing of this brief signed by counsel for the Petitioner and counsel for Cho Yang Shipping Co., Ltd. have been filed with the Clerk of this Court.

AIMU was founded in 1898 and is a national trade association comprised of over ninety insurance companies, each of which is authorized to engage in the business of marine insurance in one or more states of the United States. Because its membership underwrites approximately ninety percent of the marine insurance written in the United States, the issues of this case are of extreme importance to AIMU and its member companies.

The United States is the world's leading exporter. TRADE PROMOTION COORDINATING COMMITTEE, THE NATIONAL EXPORT STRATEGY: CORNERSTONE FOR GROWTH 3 (Oct. 1997). International trade is an integral and vital part of the U.S. economy. In fact, one-third of the economic growth in the U.S. economy over the last five years has been dependent on overseas trade. *Id.* Cargo insurance and the ability to recover from vessels and vessel owners for damage to cargo plays an important role in providing the security necessary for such trade. The decision below threatens that security. This concern for security is heightened by the fact that the current Asian financial crisis makes the need for *in rem* rights against a vessel to secure cargo damage claims all the more compelling.

AIMU's interest in this appeal also stems from its efforts to maintain certainty and uniformity in maritime law throughout the United States. Particularly, the underwriters of AIMU are concerned about the inconsistency among federal admiralty

courts as to whether a foreign forum selection clause in a bill of lading may effectively relieve a vessel of all statutory liability for cargo damage when the jurisdiction specified does not recognize a maritime lien for cargo damage or *in rem* actions against a vessel. Moreover, AIMU is interested in the uniform application of maritime laws, such as COGSA § 1303(8), and the precedent set by this Court in *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995) ("*Sky Reefer*"). This appeal may finally clarify the scope of both COGSA § 1303(8) and *Sky Reefer*. By determining that forum selection clauses will not be honored when the selected forum does not recognize the underlying cause of action, AIMU can be confident that *in rem* proceedings will continue to be available, and that a cargo owner's maritime lien rights will be adequately protected.

AIMU respectfully prays that this Honorable Court accept its brief *amicus curiae* in support of the Petition for Writ of Certiorari.

Respectfully submitted,

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BRIEF OF THE AMERICAN INSTITUTE OF MARINE UNDERWRITERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

SUMMARY OF THE ARGUMENT

This case raises an important issue which needs to be addressed by this Court: Whether a vessel may avoid liability for cargo loss or damage by inserting a forum selection clause

in bills of lading, and selecting a forum which does not recognize maritime liens or *in rem* admiralty proceedings?[1] There are two main reasons why this issue should be addressed:

i) a forum selection clause which extinguishes *in rem* liability of a vessel violates cargo owners' maritime rights under COGSA; and

ii) the decision below improperly applies this Court's decision in the *Sky Reefer* and differs with other Circuits.

The Ninth Circuit has allowed the vessel DSR ATLANTIC to circumvent COGSA through a forum selection clause in a bill of lading. The decision below permits a vessel to free itself of all liability arising from cargo damage by unilaterally extinguishing rights to maritime liens and *in rem* actions. The lower court would eradicate statutory vessel liability by permitting a carrier merely to insert a forum selection clause which specifies that disputes are to be governed in a jurisdiction that does not recognize maritime liens or *in rem* actions. As a result, the claim brought by Fireman's Fund Insurance Company ("Fireman's Fund"), the insurer of the cargo, cannot be adjudicated and its rights cannot be enforced. The instant case allows the Court an opportunity to clarify further its decision in *Sky Reefer* on the issue of a vessel avoiding statutory *in rem* liability through the unilateral insertion of a clause in a bill of lading.

This issue must be addressed, both because of the widespread impact it will have on international cargo transportation, and because of the need for uniformity in maritime law among the circuits.

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1. No counsel for any party has authored this brief in whole or in part. Only the *amicus curiae*, AIMU, and its counsel have contributed to the preparation and submission of this brief.

ARGUMENT

I

THE DECISION BELOW VIOLATES COGSA

The lower court's overbroad, erroneous interpretation of *Sky Reefer* is in direct conflict with the express statutory provisions in COGSA. *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995) ("Sky Reefer"); 46 U.S.C. § 1300 *et seq.* (1975) (originally enacted as the Carriage of Goods By Sea Act of Apr. 16, 1936, ch. 229, 49 Stat. 1207) ("COGSA").

> **Any clause**, covenant, or agreement in a contract of carriage **relieving** the carrier or **the ship from liability** for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this chapter, **shall be null and void and of no effect**.

46 U.S.C. § 1303(8) (emphasis added). The effectiveness of this provision of COGSA would be completely vitiated if the lower court's decision is allowed to stand.

Until the lower court decision, no American court had permitted the application of a forum selection clause so as to extinguish a maritime lien and deny *in rem* liability under COGSA. This prohibition is so universally acknowledged that even the leading text on admiralty law in the United States declares that a clause in a bill of lading may not be used to void maritime liens and *in rem* liability of a vessel.

> Cogsa and Harter contain prohibitions against the carrier or the vessel's contracting out of these liens.

GRANT GILMORE AND CHARLES BLACK, JR., THE LAW OF ADMIRALTY 187 (2d ed. 1975). Nevertheless, the decision below ignores the prohibitions in COGSA and permits the use of such a clause to violate the prohibition on voiding the *in rem* liability of the ship.

Under the guise of denying a mere "procedural" process to cargo interests, the lower court has in effect abridged a substantive right guaranteed to American exporters and importers. Indeed, the denial of the *in rem* remedy does more than prejudice cargo's substantive rights under COGSA. The availability of the *in rem* remedy is outcome-determinative; without it, cargo's statutory rights against the vessel for loss or damage to cargo are unenforceable. By denying cargo interests the right to the *in rem* remedy, the loss of their other substantive rights against the vessel under COGSA is guaranteed.

In waiving the statutory rights of cargo claimants to *in rem* proceedings against the ship, the lower court revealed a fundamental misunderstanding of this special admiralty proceeding. The maritime lien gives the claimant a property right in the ship. *The Lottawanna*, 88 U.S. 558, 579 (1874); *see also* 2 BENEDICT ON ADMIRALTY § 22 (7th ed. 1997). In some maritime cases, the ship can be liable but not the owner, yet in this case, the lower court would permit the unilateral extinguishing of all rights against the vessel. David J. Sharpe and Philip A. Burns, *Practice and Procedure - Maritime Arrest* § 2 (1994), *in* 5 BENEDICT ON ADMIRALTY (7th ed. 1997). This Court has consistently acknowledged the special characteristics of *in rem* admiralty actions. *See California v. Deep Sea Research, Inc.*, 118 S. Ct. 1464 (Apr. 22, 1998). But the decision below does away with all rights a cargo owner may have against a

ship by eliminating *in rem* liability by sending the action to a forum where it is not recognized.

A procedure unique to American admiralty practice is the action *in rem* against a vessel or other maritime property. 2 THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW 478 (2d ed. 1994). The *in rem* action is a special admiralty remedy uniquely suited to enforce maritime liens, which are distinctive to admiralty. *Id.* at 502.

> Every valid claim for cargo loss or damage creates a maritime lien against the ship. Thus, where we have spoken of a liability of the "carrier" the reader may supply "and of the ship." Such a lien is of course enforced by the action *in rem*. . . .

GILMORE AND BLACK, *supra*, at 186. The necessity of enforcing the liability of peripatetic ships through *in rem* actions is apparent. Congress acknowledged this when it provided specifically in COGSA for the liability of the ship in recognition of the *in rem* remedy afforded to cargo claimants. *See* COGSA § 1303(8) (making any clause relieving a ship from COGSA liability null and void). The *in rem* remedy is a fundamental substantive right guaranteed by COGSA. The court below erred when it cavalierly dismissed it as mere procedure. App. 3a.[2]

> The *in rem* suit is peculiar to Admiralty law and to understand it one must also understand the concept of "maritime lien." A maritime lien is a privileged claim upon maritime property. For example: following a collision, maritime law gives the aggrieved party — and usually both parties consider themselves the aggrieved party — a privileged claim

2. References to "App." are to the Appendix to Fireman's Fund's Brief on Petition for Writ of Certiorari submitted to this Court.

> or maritime lien against the colliding vessel. This lien is enforced by filing a libel against the offending vessel. Such a proceeding is called a suit *in rem*; the vessel in which a lien is claimed is then taken into the custody of the court or "arrested." In other words, the plaintiff arrests the ship to compel the defendant to appear or to provide security to answer the claim (which may or may not prove to be well founded). This is known as the procedure of Admiralty arrest.
>
> The arrest of a ship puts a very effective pressure on her owner to provide bail or security for the amount of the libel and thereby obtain the release of his ship from arrest. The plaintiff, by the arrest of the ship, immediately obtains security for his claim. If he is ultimately successful in his suit, he can enforce judgment by selling the ship (if she has remained under arrest), or by recovering against the bail or security if the ship has been released. In most cases the defendant obtains the release of his ship by providing acceptable security. . . .

LESLIE J. BUGLASS, MARINE INSURANCE AND GENERAL AVERAGE IN THE UNITED STATES 411-12 (2d ed. 1981). It is evident that Congress intended that the liability for cargo damage provided for in COGSA be enforced against the ship through the *in rem* proceeding. 46 U.S.C. §§ 1301(d), 1303(6), 1303(8), 1304(1), 1304(2), 1304(5), 1307 (separate references to "the ship"). Despite the prohibition found in COGSA § 1303(8), the lower court would permit the use of a forum selection clause to deny statutory rights. It is imperative that the decision below be reviewed so that its overreaching application of this Court's decision in the *Sky Reefer* be corrected.

II

THE DECISION BELOW DIFFERS WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS

The court below ignored important language in this Court's *Sky Reefer* decision and applied an overbroad interpretation thereby denying cargo claimants their statutory protections under COGSA. *Sky Reefer*, 515 U.S. at 540-41. This Court reiterated its position in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), specifying that, if a jurisdictional clause in a bill of lading effected a waiver of a right to pursue statutory remedies, then the Court "would have little hesitation in condemning the agreement as against public policy." *Id.* at 637. Certainly, the lower court's decision to allow the vessel DSR ATLANTIC to avoid its obligations under COGSA through a forum selection clause violates public policy. Cargo's *in rem* action to enforce maritime liens will not be permitted in Korean courts; moreover, as the decision stands, there will be no opportunity for an American court to review the matter. By unilaterally inserting a forum selection clause in a bill of lading to require adjudication in a country that does not recognize *in rem* actions, a shipowner can deprive cargo claimants of their statutory rights under COGSA to pursue their claims against a vessel.

The decision below stands in sharp contrast with those of other circuits holding that denial of maritime lien rights by contract violates COGSA. For example, in *Dods Shipping Ltd. of Nassau, N.P. v. Karobi Lumber Co.*, 397 F.2d 570 (5th Cir. 1968), the Fifth Circuit held that an otherwise enforceable charter party clause was void because it "lessened liability" in contravention of the specific aims of COGSA through a lien prohibition clause. Also, in *Associated Metals & Minerals Corp. v. M/V Arktis Sky*, 978 F.2d 47 (2d Cir. 1992), the Second

Circuit held that any attempt by a carrier to limit liability would be unenforceable. "The plain language of section 1303(8) [of COGSA] forbids enforcement of agreements to relieve carriers of liability for negligence." *Id.* at 49. *See also Demsey & Associates, Inc. v. S.S. Sea Star*, 461 F.2d 1009, 1014 (2d Cir. 1972) (COGSA prohibits a shipowner from contracting out of *in rem* liability.).

Because Korean law does not recognize *in rem* rights in cargo damage cases, it is certain that if the instant forum selection clause is enforced, the carrying vessel will be relieved of liability. Under Korean law, the DSR ATLANTIC will not be subjected simply to "lesser" liability, but rather, will avoid liability altogether.

Two federal district courts have also determined that maritime liens and *in rem* actions are substantive rights protected by COGSA. The district court in this action properly determined that to permit adjudication in Korea would lessen the liability of the ship in contravention of COGSA. App. 18a. Because Korea does not recognize American *in rem* actions, cargo claimants would be unable to pursue their claims against the vessel. If the forum selection clause were given effect, COGSA liabilities of the ship would be eradicated and Fireman's Fund's rights would be lessened within the meaning of Section 3(8) of COGSA. App. 19a.

The Southern District of New York recently declared that the language of COGSA "would be rendered meaningless if an *in rem* action were viewed simply as a procedural device and not protected under § 3(8) as interpreted by *Sky Reefer*." *International Marine Underwriters CU v. M/V Kasif Kalkavan*, 989 F. Supp. 498, 499 (S.D.N.Y. 1998) (expressing disagreement with the Ninth Circuit's decision in this case). However, another decision in the same district permitted the

dismissal of an action against a charterer based on a forum selection clause naming Korea. Nevertheless, the cargo claimant was free to proceed against the shipowner and the vessel *in rem* in the U.S. in a duplicative action. *Hyundai Corp. U.S.A., Inc. v. M/V An Long Jiang*, No. 97 CIV. 3855, 1998 WL 13835, 1998 A.M.C. 854 (S.D.N.Y. Jan. 15, 1998).

In another related development, the District of South Carolina recently refused to enforce a forum selection clause because an insurer's right of subrogation is not recognized under Korean law. *Gibbs Int'l, Inc. v. Federal Ins. Co.*, No. 7:95-3571-20, 1997 WL 729077, 1997 A.M.C. 2954 (D.S.C. Feb. 26, 1997). The court was particularly concerned about the potential for greatly diminishing the shipper's right to recover. *Id.* The decision below conflicts with authority on the enforceability of forum selection clauses which would deny cargo shippers' rights against the vessel. The petition should be granted so that the Ninth Circuit decision can be harmonized with COGSA and the great weight of authority.

CONCLUSION

It is respectfully submitted that the Petition for Writ of Certiorari should be granted in this matter.

The decision, if allowed to stand will cause significant disruption in maritime commerce.

The rights guaranteed by COGSA to cargo owners will be extinguished whenever a carrier unilaterally inserts a clause in a bill of lading forcing cargo damage claims litigation to forums such as Korea which do not allow *in rem* proceedings against a vessel.

For the reasons set forth herein, it is respectfully submitted that the decision of the court below is erroneous and should be reviewed by this Court.

Respectfully submitted,

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